



Federal Communications Commission
Washington, D.C. 20554

November 13, 2017

DA 17-1108

Scott R. Friermuth
Counsel, Governmental Affairs
Sprint Corporation
6450 Sprint Parkway
Overland Park, KS 66251

Re: Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CG Docket No. 03-123; Waiver of Speed of Answer Rule

Dear Mr. Friermuth:

This letter order addresses a request by Sprint Corporation (Sprint) for waiver of the Federal Communications Commission's (Commission's) speed of answer (SOA) rule for Internet Protocol Captioned Telephone Service (IP CTS) calls handled on October 6, 2016.¹ As explained below, we deny Sprint's request to waive the SOA rule because we are not persuaded that the staffing shortage at one of Sprint's call centers in Orlando, Orange County, Florida during a hurricane was not reasonably foreseeable, or that reasonable redundancy measures could not have ensured compliance with the SOA rule. However, given the unique circumstances of this incident, we find good cause to waive section 64.604(c)(5)(iii)(E)(4) of the rules, which restricts payment to TRS providers operating pursuant to the mandatory minimum standards, in order to allow partial compensation for IP CTS minutes of use handled by Sprint on October 6.²

¹ See Sprint Petition for Waiver, CG Docket No. 03-123 (filed Dec. 27, 2016) (Petition). See also *Ex Parte* in Support of Sprint's Petition for Waiver of the IP CTS Speed of Answer Measurement in Relation to Hurricane Matthew, Letter from Scott Friermuth, Counsel, Sprint Government Affairs, Federal Regulatory, to Marlene H. Dortch, Secretary, FCC (May 5, 2017) (Sprint Supplemental *Ex Parte* Letter). IP CTS is a telecommunications relay service (TRS) designed to allow people with hearing loss to speak directly to another party on a telephone call and to simultaneously listen to the other party and read captions of what that party says over an IP-enabled device. 47 CFR § 64.601(a)(17). The Interstate TRS Fund (Fund) compensates eligible providers of IP CTS for their reasonable costs of providing these services. *Id.* § 64.604(c)(5)(iii).

² 47 CFR § 64.604(c)(5)(iii)(E)(4) ("The TRS Fund administrator shall make payments only to eligible TRS providers operating pursuant to the mandatory minimum standards . . .").

Background

The SOA rule requires that IP CTS providers answer 85 percent of all calls within 10 seconds, measured daily.³ To enforce this mandatory minimum standard, Commission rules provide that “Internet-based Relay Providers seeking compensation from the Fund shall submit speed of answer compliance data”⁴ and “[t]he TRS Fund administrator shall make payments only to eligible TRS providers operating pursuant to the mandatory minimum standards.”⁵ Because Sprint did not satisfy the SOA metric on October 6, 2016, the TRS Fund Administrator withheld payment to Sprint for all of the minutes that it handled that day.⁶ In its petition, Sprint does not contest that it failed to comply with the SOA rule, but it requests a waiver of the SOA rule for that day and, based on such waiver, compensation for the services provided.⁷

The facts of this case, presented by Sprint and supported by official sources, reveal that in late September 2016, a significant weather event began off the African coast, which increased in strength as it moved westward, and transitioned to Tropical Storm Matthew near the Windward Islands on or around September 28th.⁸ After reaching the Caribbean, Matthew became a hurricane, and over the next few days made landfall, arriving in the Bahamas on October 5-6 as a Category 3 and 4 hurricane.⁹ Sprint states that it had expected that Orlando, being inland, would not be severely affected.¹⁰ Nevertheless, in response to reports of the storm’s path, Sprint states that its call center management partner in Orlando developed and set into action a plan which was “adjusted as the path and the nature of Hurricane Matthew revealed itself.”¹¹ On October 4, 2016, a hurricane watch went into effect that day for Orange County, for

³ 47 CFR § 64.604(b)(2)(ii). Our rules further require that TRS providers “ensure adequate TRS facility staffing to provide callers with efficient access under projected calling volumes, so that the probability of a busy response due to CA [communications assistant] unavailability shall be functionally equivalent to what a voice caller would experience in attempting to reach a party through the voice telephone network.” 47 CFR § 64.604(b)(2)(i).

⁴ 47 CFR § 64.604(c)(5)(iii)(D)(3).

⁵ 47 CFR § 64.604(c)(5)(iii)(E)(4). We refer to this rule as the “payment rule” in this Order to distinguish it from the SOA rule setting forth the applicable mandatory minimum standard for SOA for this service.

⁶ See 47 CFR 64.604(c)(5)(iii)(L) (outlining procedures for instances in which the Fund administrator determines that payments for certain minutes should be withheld). The Bureau has explained that such withholding of compensation is not a “penalty” for noncompliance; rather compensation is withheld because service provided on the day in question did not meet the minimum TRS standards and therefore does not qualify as service entitled to compensation from the TRS Fund. *Structure and Practices of the Video Relay Service Program*, Order, 29 FCC Rcd 7569, 7577 n.69 (CGB 2014) (2014 VRS SOA Order).

⁷ Petition at 1.

⁸ National Weather Service, National Hurricane Center, Hurricane Matthew (AL143016) at 2 (2017), http://www.nhc.noaa.gov/data/tcr/AL142016_Matthew.pdf (Hurricane Matthew Report); Supplemental Ex Parte Letter at 2.

⁹ Hurricane Matthew Report at 2-4; Supplemental Ex Parte Letter at 2.

¹⁰ Petition at 2.

¹¹ Sprint Supplemental Ex Parte Letter at 2, Attachment A (containing an email from Paul Bushland, Captel, to Patti Ruether, Ron Peay, Pam Frazier, Kevin Colwell, and Jane Turner (October 21, 2016), outlining the actions taken by Captel, Sprint’s contractor, during the lead-up to Hurricane Matthew).

which Orlando is the county seat.¹² On October 5, Hurricane Matthew initially remained a Category 3 storm, but later that day, official forecasts warned that the storm would be significantly worse than originally anticipated and various counties bordering Orange County were added as evacuation zones.¹³

By this time, Sprint states, it and its call center management partner had already initiated contingency planning to mitigate possible harm from the storm, which included ***BEGIN
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On October 6, Sprint reports, the human element and the fear caused by the expected, intensified Category 4 hurricane led to a much higher rate of absenteeism at the Orlando IP CTS call center than anticipated.¹⁶ The storm caused sustained high winds and heavy rains in Orange County, which eventually prompted the local government to impose a mandatory curfew, effective 10:00 pm on October 6.¹⁷

As a result, Sprint reports that it experienced a “double whammy” on October 6.¹⁸ First, according to Sprint, “the state of emergency, the curfew, as well as the hurricane’s high winds and heavy rain had a significant impact on the staffing levels at [its] Orlando call center,” one of the highest volume

¹² Public Advisory, National Weather Service, National Hurricane Center, Hurricane Matthew Advisory Number 28 (Oct. 4, 2016), <http://www.nhc.noaa.gov/archive/2016/al14/al142016.public.026.shtml?> (announcing a hurricane watch for North of Sebastian Inlet to the Flagler/Volusia county line).

¹³ Press Release, Gov. Scott Issues Updates on Hurricane Matthew Preparedness Efforts as Storm Approaches Florida (Oct. 5, 2016), <http://www.floridadisaster.org/eoc/PressReleases/10%2005%2016%20GOV.%20SCOTT%20ISSUES%20UPDATES%20ON%20HURRICANE%20MATTHEW%20PREPAREDNESS%20EFFORTS%20AS%20STORM%20APPROACHES%20FLORIDA%20.pdf>; Public Advisory, National Weather Service, National Hurricane Center, Hurricane Matthew Advisory Number 30 (Oct. 5, 2016), <http://www.nhc.noaa.gov/archive/2016/al14/al142016.public.030.shtml?>; Press Release, Florida Division of Emergency Management, Gov. Scott Requests Emergency Declaration From President; Suspends Tolls; Calls Up More National Guard (Oct. 5, 2016), <http://www.floridadisaster.org/eoc/PressReleases/10-05-2016-GOV%20SCOTT%20REQUESTS%20EMERGENCY%20DECLARATION%20FROM%20PRESIDENT%20SUSPENDS%20TOLLSNationalGuarddeploy.pdf>. (discussing current storm forecast and urging action by individuals under evacuation orders).

¹⁴ Petition at 4-5; Supplemental *Ex Parte* Letter at Attachment A.

¹⁵ Petition at 4; Supplemental *Ex Parte* Letter at 2, Attachment A.

¹⁶ Supplemental *Ex Parte* Letter at 3.

¹⁷ Petition at 2-3; *see also* Orange County Government’s Newsroom Media Center, *Hurricane Matthew Information*, available at <http://www.orangecountyfl.net/Newsroom/HurricaneMatthewInformation.aspx#.WL4Phn8zDZ0> (visited Mar. 6, 2017) (“In an effort to protect the life and safety of all citizens and first responders, a mandatory curfew has been put into effect for Orange County from Thursday, Oct. 6 at 10 p.m. through Saturday, Oct. 8 at 7 a.m. Please stay off the roads unless there are extenuating circumstances.”). The curfew was lifted at 2 p.m., Friday, October 7. *Id.*

¹⁸ Petition at 5; Supplemental *Ex Parte* Letter at 2.

call centers handling . . . Sprint's IP CTS traffic.¹⁹ Second, on the same day, Sprint reports an increase in daily call count and minutes of use, as compared with the average daily call count and minutes of use for the rest of October.²⁰ According to Sprint, the unanticipated reduction in available staff, coupled with the higher than usual demand for IP CTS, caused Sprint to miss the SOA metric for the day in question.²¹

Discussion

A Commission rule may be waived for "good cause shown."²² In particular, a waiver is appropriate where the particular facts make strict compliance inconsistent with the public interest.²³ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.²⁴ Waiver of a Commission rule is therefore appropriate if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.²⁵

Applying the waiver standard under the particular circumstances here, we find that Sprint has failed to show good cause for a waiver of the SOA rule for October 6, 2016. As the Commission has previously explained, TRS providers are required to ensure adequate staffing to achieve service that is functionally equivalent to that experienced by voice telephone users²⁶ and to engage in intelligent planning for network design, facilities redundancy,²⁷ and CA staffing, consistent with the Commission's blocked-call standard, so that they do not have difficulty meeting the minimum SOA standard, absent extraordinary circumstances.²⁸ Such adequate staffing and facility redundancy are particularly important in potentially life-threatening situations to ensure that TRS users have access to reliable communications during emergencies.

Sprint has failed to demonstrate that, in this case, extraordinary circumstances warrant a waiver of the SOA rule. Because different types of natural disasters occur in different parts of the country, it is reasonable to expect that TRS providers will take such potential risks into account in their selection and

¹⁹ Petition at 3. *****BEGIN CONFIDENTIAL*****

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Sprint appears to recognize in its supplemental filing, given that the curfew wasn't actually imposed until 10 pm on the 6th, the curfew itself appears unlikely to have had a significant impact on Sprint's ability to staff its call center. See Supplemental *Ex Parte* Letter at Attachment A, p. 2.

²⁰ Supplemental *Ex Parte* Letter at 2.

²¹ Petition at 2-4.

²² 47 CFR § 1.3.

²³ See *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

²⁴ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular*, 897 F.2d at 1166.

²⁵ See *Northeast Cellular*, 897 F.2d at 1166.

²⁶ See 47 CFR § 64.604(b)(2)(i).

²⁷ Section 64.604(b)(4)(ii) of the Commission's rules require TRS to have "redundancy features functionally equivalent to the equipment in normal central offices, including uninterruptible power for emergency use."

²⁸ *Purple Communications, Inc., Request for Review of the Decision of the TRS Administrator to Withhold TRS Payments*, Order, 27 FCC Rcd 8014, 8022, para. 22 (CGB 2012) (2012 *Purple SOA Order*); see also *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking 15 FCC Rcd 5140, 5167-68, para. 65 (2000) (2000 *TRS Order*).

geographic diversification of call center locations (which need not be located in the geographic areas in which their customers are located), and undertake advance contingency planning to maintain redundancy of service, for example by arranging to route incoming calls to back-up locations.²⁹ Further, warnings and watches for this storm began to be reported in Florida several days before the day on which the SOA was missed, and Sprint acknowledges that Florida came under a state of emergency as of October 3.³⁰ Moreover, a National Weather Service public advisory issued on October 4 made clear that the storm was destined for central Florida, and further that it was expected to intensify overnight into a Category 4 hurricane before hitting the Florida coast.³¹ Sprint has failed to provide direct evidence that it took all reasonable steps necessary to maintain redundancy of service, *both* through comprehensive advance contingency planning *and* through specific measures in the days leading up to the arrival of the hurricane, to ensure that sufficient traffic would be shifted to other call centers in the event Orlando was impacted. We are particularly concerned that Sprint's decision to route a disproportionately high percentage of traffic through a single call center left Sprint vulnerable to missing the SOA requirement in the event that a natural disaster negatively impacted that center.³² Thus, we conclude that a waiver of the SOA rule for Sprint is not warranted because what happened in this case—with high absenteeism and a higher call rate in Florida during a hurricane—was neither unforeseeable nor unavoidable with adequate advance planning.³³

While we deny Sprint's request for a waiver of the SOA rule, we find good cause to waive our rule that would deny Sprint any compensation at all for the day in question.³⁴ In particular we find that there were extraordinary circumstances in this case, the provider took significant steps to mitigate harm from the extraordinary circumstances, the provider narrowly missed the minimum standard despite these mitigation efforts, and the missed performance was not part of a pattern of poor performance. This is not a case in which the service provided is tantamount to providing no service at all.³⁵ Furthermore, granting

²⁹ See 47 CFR § 64.604(b)(2)(i).

³⁰ Petition at 2.

³¹ Public Advisory, National Weather Service, National Hurricane Center, Hurricane Matthew Advisory Number 28 (Oct. 4, 2016), <http://www.nhc.noaa.gov/archive/2016/al14/al142016.public.026.shtml?>

³² Sprint reports that its "Orlando call center is one of its highest volume call centers handling up to roughly ***BEGIN CONFIDENTIAL*** [REDACTED] ***END CONFIDENTIAL*** of Sprint's traffic." Petition at 3.

³³ The circumstances here are different from the circumstances faced by Hamilton Relay, Inc. (Hamilton) in the recent grant to Hamilton of a waiver of the SOA rule. Letter from Karen Peltz Strauss, Deputy Chief, Consumer and Governmental Affairs Bureau, FCC to David A. O'Connor, counsel to Hamilton, DA 17-350 (CGB 2017) (*2017 Hamilton Waiver Order*). In the case of Hamilton, without warning, a tornado destroyed Hamilton's IP CTS call center in Albany, Georgia on January 2, 2017. Following a roof collapse at its Georgia call center, Hamilton rerouted traffic to other call centers and complied with the SOA rule for several days. However, a spike in traffic caused by an increase in IP CTS call volume on January 7, 2017, resulting from a major ice storm in the northeast, caused Hamilton to miss the SOA for a single day. The sudden destruction of an entire call center, which had been staffed with 225 CAs, combined with this second set of extraordinary circumstances several days later, was a confluence of events that justified the grant of the waiver in that case.

³⁴ See 47 CFR § 64.604(c)(5)(iii)(E)(4); *2014 VRS SOA Order*, 29 FCC Rcd at 7577 n.69 (stating that, pursuant to the rule, "compensation is withheld because service provided on the day in question did not meet the minimum TRS standards and therefore does not qualify as service entitled to compensation from the TRS Fund").

³⁵ See, e.g., *2012 Purple SOA Order*, 27 FCC Rcd at 8020, 8022-24, paras. 13, 22-23, 26-27 (discontinuing the former "sliding scale" approach to SOA violations for IP Relay providers after one provider with "pervasive

a waiver to allow partial compensation in this instance better serves the purposes of the rule than strict compliance.

In this case, the particular events surrounding Hurricane Matthew did pose extraordinary circumstances. While hurricanes are not uncommon in Florida, their strongest impacts are less common in inland areas like Orlando,³⁶ and the particular path of Hurricane Matthew remained unpredictable right up until its arrival in Florida. Additionally, there was a greater than expected rate of absenteeism on October 6th. Faced with these extraordinary circumstances, Sprint took significant steps to ensure that it could continue to provide service meeting the SOA standard. While Sprint's advance planning actions to ensure redundancy were not sufficient to prevent the SOA violation that occurred as described above, Sprint and its partners did take significant steps to mitigate the impact from Hurricane Matthew, including, as noted above, *****BEGIN CONFIDENTIAL***** [REDACTED]

[REDACTED] *****END CONFIDENTIAL***** Despite these significant efforts, Sprint narrowly missed *****BEGIN CONFIDENTIAL***** [REDACTED] *****END CONFIDENTIAL***** the SOA measurement on the day in question.³⁸ Finally, the missed measurement was not part of a pattern of poor performance. Sprint notes that any violation of the SOA standard was unusual for Sprint's IP CTS operations, which it says far exceeded the Commission's mandatory minimum SOA in 2016.³⁹ Records kept by the TRS Fund administrator confirm that *****BEGIN CONFIDENTIAL***** [REDACTED] *****END CONFIDENTIAL***** We also find it relevant that Sprint was able to meet the mandated SOA on all days leading up to and after the hurricane, including October 7th, the actual day that the hurricane was expected to peak in that area.⁴⁰ Given these factors, we find that it would be inequitable to deny compensation for a full day's service in this instance.

We find that providing partial compensation under these circumstances better serves the purposes of the payment rule than strict compliance. The purpose of the payment rule is to promote compliance with the mandatory minimum standards, which in turn ensure that compensated service is functionally equivalent to non-TRS services.⁴¹ We note that in this case, Sprint was engaging in various

noncompliance" and a lack of extraordinary circumstances claimed payment despite missing the 85/10 SOA standard on 123 days over four months).

³⁶ See National Oceanic and Atmospheric Administration, Historical Hurricane Tracks, <https://coast.noaa.gov/hurricanes/index.html> (last visited Nov. 6, 2014) (revealing that prior to Hurricane Matthew, the last hurricane to impact the Orlando area was in 2004).

³⁷ Sprint Petition at 4-5; Supplemental *Ex Parte* Letter at Attachment A.

³⁸ Instead of answering at least 85% of all calls within 10 seconds, Sprint answered *****BEGIN CONFIDENTIAL***** [REDACTED] *****END CONFIDENTIAL***** of its calls on that day within 10 seconds. Supplemental *Ex Parte* Letter, Attachment B.

³⁹ Sprint reports that it had a 2016 calendar year average of answering calls within 10 seconds *****BEGIN CONFIDENTIAL***** [REDACTED] *****END CONFIDENTIAL***** percent of the time. Petition at 7.

⁴⁰ Florida officials reported that by the evening of October 7, more than a million people were without power in the state. Press Release, Florida Division of Emergency Management, Gov. Scott Issues Updates on Hurricane Matthew Preparedness and Response Efforts as Storm Continues to Impact Florida (Oct. 7, 2016).

⁴¹ See 2000 TRS Order, 15 FCC Rcd at 5158, 5168, 5213, paras. 39, 66 & app. B (concluding that "it is appropriate to have national minimum standards whenever the interstate TRS Fund is being used to support the provision of a relay service," and stating that the revised 85/10 SOA rule "will ensure calls are received and answered by relay

mitigation efforts to provide a high level of service on October 6th despite the extraordinary circumstances surrounding Hurricane Matthew. By waiving the strict application of the payment rule in these limited circumstances, we believe that we are signaling to TRS providers that they should take prompt action to mitigate the effect of extraordinary events, and thus providing an incentive to come as close as possible to the minimum standard when faced with extraordinary events. We find that, under these circumstances, a waiver of the payment allowing for partial compensation is in the public interest because it better serves the purposes for which the rule was adopted. To the extent that the Bureau has indicated over the years that we would strictly adhere to the 85/10 standard in addressing requests for compensation, we did so in the context of our discontinued “sliding scale” approach, and we did not intend to suggest that a waiver for good cause would never be appropriate.⁴² The facts of this case present just such an appropriate circumstance for a waiver of the payment rule.

Therefore, in order to effectively fulfill the SOA goal of ensuring that relay services are functionally equivalent to voice telephone services, while at the same time maintaining principles of equity that address the extraordinary circumstances in this case through a waiver of the payment restriction rule,⁴³ we direct the TRS Fund administrator to make a payment of TRS compensation to Sprint in the amount of 50 percent of the amount of compensation otherwise due for October 6, 2016. We believe that compensation in this amount will provide the appropriate incentive for providers to undertake all reasonable efforts to mitigate the effects of exigent circumstances even if they find, during the course of a day, that they are likely to miss the SOA for that day.

Accordingly, IT IS ORDERED that, pursuant to sections 0.141, 0.361, and 1.3 of the Commission’s rules, 47 CFR §§ 0.141, 0.361, 1.3, Sprint’s request for waiver of the Commission’s speed-of-answer rule, 47 CFR § 64.604(b)(2), is DENIED.

IT IS further ORDERED that, a waiver of section 64.604(c)(5)(iii)(E)(4) of the Commission’s rules, 47 CFR § 64.604(c)(5)(iii)(E)(4), IS GRANTED IN PART.

IT IS FURTHER ORDERED that, the TRS Fund administrator shall provide payment to Sprint for 50% of the compensation otherwise due to Sprint for IP CTS services provided on October 6, 2016.

centers as quickly as possible, thereby giving TRS users functionally equivalent service”); *Telecommunications Relay Service, and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Third Report and Order, 8 FCC Rcd 5300, 5305 (1993) (adopting the payment rule and concluding that “only TRS providers in compliance with the mandatory minimum standards set forth in Section 64.604 . . . shall be eligible for TRS Fund payments”).

⁴² See *2014 VRS SOA Order*, 29 FCC Rcd at 7577-78, paras. 25-26 (denying providers’ requests for reinstatement of a “sliding scale” approach to withholdings for violation of the SOA rule and noting that “[i]n those instances where there is a legitimate reason for a provider’s failure to comply with the rule, the option of requesting a waiver tailored to the particular situation remains available to any provider”); *2012 Purple SOA Order*, 27 FCC Rcd at 8024, para. 27 & n.75; see also *Structure and Practices of the Video Relay Service Program et al.*, CG Docket Nos. 10-51 & 03-123, Report and Order, Notice of Inquiry, Further Notice of Proposed Rulemaking, and Order, 32 FCC Rcd 2436, 2451-52, para. 37 (2017) (rejecting a request by VRS providers for the Commission to adopt a self-executing exemption from the VRS SOA standard, but stating that providers may bring exigent circumstances to the attention of the Commission in the form of a waiver request, including a description of the nature of the exigent circumstances and a discussion of what the provider is doing to mitigate the effects of such circumstances, which shall be reviewed on its merits on a case-by-case basis).

⁴³ 47 CFR § 64.604(c)(5)(iii)(E)(4).

IT IS FURTHER ORDERED that this Order shall be effective as of the date of issuance.

Sincerely,

G. Patrick Webre
Acting Chief
Consumer and Governmental Affairs Bureau